

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 16, 2007 Session

CITY OF RED BANK, TENNESSEE v. PETER H. PHILLIPS

Appeal from the Chancery Court for Hamilton County
No. 05-1071 W. Frank Brown, III, Chancellor

No. E2006-02267-COA-R3-CV - FILED DECEMBER 20, 2007

The City of Red Bank (“City”) filed this declaratory judgment action against Peter H. Phillips (“Owner”) alleging that his property at 217 W. Newberry Street was being utilized for multi-family purposes in violation of its single family zoning. Owner admitted to the use of the premises as a three-apartment rental property. He asserted, however, that the non-conforming use of the property was permitted as a “grandfathered” use. Following a bench trial, the court found in favor of the City. Owner appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Arvin H. Reingold, Chattanooga, Tennessee, for the appellant, Peter H. Phillips.

Arnold A. Stulce, Jr. and Angela C. Larkins, Chattanooga, Tennessee, for the appellee, City of Red Bank, Tennessee.

OPINION

I.

As early as 1951, the structure at 217 W. Newberry Street was used by the Roberts family as a multi-family dwelling. The Roberts family maintained a residence in the upstairs unit. Two downstairs units were rented out. Each unit had a separate kitchen and bath. This multi-family use continued until December 2002, when one of the tenants moved out. Shortly thereafter, Mrs. Mamie Roberts, the owner of the property, died, leaving only one tenant utilizing the premises. The final tenant departed in July 2003, and the property remained vacant until March 2004, when the house was sold by Mrs. Roberts’ estate to Wallis Properties, LLC. Approximately twenty months passed during which the property was completely vacant until one tenant moved in on April 1, 2005.

Prior to purchasing the property in July 2005, Owner and his mother, Audeline Phillips, inspected the premises. Mrs. Phillips, a realtor, testified at trial that she had located the property on the Multiple Listing Service. Mrs. Phillips noted that when she and her son toured the property, one unit was occupied. She recalled that all the units were furnished and the utilities were on. Over the objection of the City's attorney, Mrs. Phillips discussed contacting a City employee who indicated to her that the non-conforming multi-family use was grandfathered in. She admitted, however, that she did not request written verification of this statement. Owner testified that he also had been advised by someone with the City that the non-conforming use was subject to grandfather protection. Additionally, Owner indicated that the property was advertised for sale during this time as a three-unit rental and was taxed by the county as commercial property.

After the City became aware of Owner's non-conforming use, it filed a petition for declaratory judgment.¹ The petition alleges, in part, as follows:

The property located at 217 W. Newberry Street, owned by the plaintiff has, for many years, been located in an R-1 Residential Zone. . . .

The permitted uses section of the Red Bank Zoning Ordinance applicable to the R-1 Residential Zone does not permit multi-family residential uses, i.e. for more than one family to occupy a dwelling unit in that R-1 Zone. Accordingly, any use of the premises . . . as a multi-family dwelling is in violation of the Red Bank Zoning Ordinance and is a "non-conforming use" pursuant to said Ordinance.

The house and lot . . . is configured for three (3) separate apartments/dwelling units and the respondent has leased or is offering to lease three (3) separate dwelling units/apartments located in that structure. Utilization of the premises for multi-family occupancy and/or for more than one dwelling unit is in violation of the Red Bank Zoning Ordinance.

Upon information and belief, the premises . . . may have been, in times past, utilized as a multi-family dwelling. Use of the property as a multi-family dwelling in times past may or may not have been lawful pursuant to "the grandfather clause"

¹The City sought the imposition of a civil penalty of up to \$50 per day against Owner. Because the provisions of the City's ordinances introduced at trial did not contain a civil penalty provision, the trial court denied this relief.

The petitioner would show that the premises were owned or occupied until approximately December 15, 2002 when a former owner died. Since on or about June of 2003, the premises have been totally unoccupied until approximately April 1, 2005, a time period of 22 months, . . . On or about April 1, 2005, a single individual began, apparently, to live in and occupy one of the separate apartments

The Red Bank Zoning Ordinance, subsection (205.01), provides, in pertinent part with respect to “non-conforming uses”, as follows:

The lawful use of a building existing at the time of the passage of this Ordinance shall not be affected by this Ordinance, although such use does not conform to the provisions of this Ordinance; and such use may be extended throughout the building . . . If such non-conforming building *is removed or the non-conforming use of such building is discontinued for 100 consecutive days*, . . . every future use of such premises shall be in conformity with the provisions of this Ordinance.

The Petitioner has refused demands and requests from the City of Red Bank not to utilize the property . . . except as a single family residence. During the course of a City Commission meeting on or about September 13, 2005, the respondent made clear his intention to remodel the separate apartment units and utilize the property as a multi-family dwelling and to not conform and adhere to the requirements of the R-1 Residential Zone regulations of the Red Bank Zoning Ordinance.

(Paragraph numbering omitted; emphasis in original).

In Owner’s answer, he stated that at the time he purchased the property “and at all times prior to said date the property was maintained and used as a three unit dwelling containing three separate and distinct apartment units,” the “apartment units were used as a three unit apartment structure prior to the enactment of the present R-1 Residential Zone designation and was and is at present a lawful use as a multi-family dwelling,” and “at the time of his purchase the property was used as a multi-family apartment structure.” Owner contended that his non-conforming use of the property should be permitted as a “grandfathered” use.

After the matter was heard on August 24, 2006, the trial court, sitting without a jury, determined that (1) the City’s complaint for declaratory relief and to enforce the zoning ordinance

was sustained and (2) that Owner was enjoined from using the real estate in a manner not in conformity with the single-family provisions of the City's zoning ordinance. Owner timely appealed.

II.

Owner raises the following issues:

1. The Chancellor's ruling that the statute does not apply to protect the non-conforming use of the property was in error because, even without subsection (g) of Tenn. Code Ann. § 13-7-208, the statute still applies to protect non-conforming uses.
2. The Chancellor's ruling that a "discontinuance" of the non-conforming use occurred under the ordinance is erroneous because there was no intent to abandon the premises and because the property was always held out as a multiple rental property.

III.

In a non-jury case, our review is *de novo* upon the record before us, accompanied by a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). We accord no such deference to the trial court's conclusions of law. ***S. Constructors, Inc. v. Loudon County Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001); ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997).

The issues raised on this appeal involve the interpretation of state statutes and local ordinances. The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." ***LensCrafters, Inc. v. Sundquist***, 33 S.W.3d 772, 777 (Tenn. 2000); ***Carson Creek Vacation Resorts, Inc. v. Dep't of Revenue***, 865 S.W.2d 1, 2 (Tenn. 1993). To determine legislative intent, one must look to the natural and ordinary meaning of the language used in the statute itself. We must examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. ***State v. Flemming***, 19 S.W.3d 195, 197 (Tenn. 2000). The statute should be read "without any forced or subtle construction which would extend or limit its meaning." ***Nat'l Gas Distribs., Inc. v. State***, 804 S.W.2d 66, 67 (Tenn. 1991).

Courts are instructed to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." ***Tidwell v. Collins***, 522 S.W.2d 674, 677 (Tenn. 1975). Courts must presume that the General Assembly selected these words deliberately, ***Tenn. Manufactured Hous. Ass'n v. Metro. Gov't***, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990), and that the use of these words conveys some intent and carries meaning and purpose. ***Tenn. Growers, Inc. v. King***, 682 S.W.2d 203, 205 (Tenn. 1984). The same rules and principles are applied when

construing zoning ordinances. *Lions Head Homeowners' Ass'n v. Metro. Bd. of Zoning Appeals*, 968 S.W.2d 296, 301 (Tenn. Ct. App. 1997).

The applicable “grandfather” provision is codified at Tenn. Code Ann. § 13-7-208 (Supp. 2006). The owner contends that the statute permits him to continue his non-conforming use. The statute provides, in relevant part, as follows:

In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, *commercial or business establishment* in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Tenn. Code Ann. § 13-7-208(b)(1) (emphasis added). Subsection (g) of the statute adds the following:

The provisions of subsections (b)-(d) shall not apply if an industrial, commercial, or other business establishment ceases to operate for a period of thirty (30) continuous months and the industrial, commercial, or other business use of the property did not conform with the land use classification as denoted in the existing zoning regulations for the zoning district in which it is located. Anytime after the thirty (30) month cessation, any use proposed to be established on the site, including any existing or proposed on-site sign, must conform to the provisions of the existing zoning regulations. . . .

Subsection (g) was added in 2004 and became effective on May 28, 2004. The trial court found, however, that this amendment to the statute cannot have retrospective effect to invalidate a lawful zoning ordinance. Further, the court determined that the property had already been vacant over 100 days prior to this subsection becoming effective. The trial court therefore concluded that “this case is controlled by the law in existence before the 2004 amendments to Tenn. Code Ann. § 13-7-208, *which would be the Red Bank ordinance.*” (Emphasis added).

The City’s ordinance at issue contains the following:

(A) Single-family dwelling.

* * *

2. SECTION 11-205.

Non-conforming Uses:

The lawful use of a building existing at the time of the passage of this Ordinance shall not be affected by this Ordinance, although such use does not conform to the provisions of this Ordinance; and such use may be extended throughout the building. . . . If such non-conforming building is removed or the non-conforming use of such building is discontinued for 100 consecutive days, every future use of such premises shall be in conformity with the provisions of this Ordinance.

IV.

A.

The trial court determined that Tenn. Code Ann. § 13-7-208 and its subsections did not apply to supersede the ordinances relied upon by the City. As indicated above, the trial court specifically found that subsection (g), which introduces the discontinuance period of 30 months for non-conforming uses, was not in effect at the time the events at issue took place.

Owner argues that even without subsection (g), the trial court erred in assuming that Tenn. Code Ann. § 13-7-208 no longer afforded any protection to the non-conforming use. He asserts that the statute, without subsection (g), was in effect at all times pertinent to this litigation. Thus, Owner contends that while subsection (g) may not apply to the case at hand, the rest of the statute, including subsection (b)(1), is applicable. If subsection (g) is applicable, Owner contends that the property was not completely unoccupied for thirty months or longer, as required by law. Tenn. Code Ann. § 13-7-208(g). Therefore, Owner argues that the trial court committed reversible error in the manner in which it applied the City's ordinance.

In *Bramblett v. Coffee County Planning Comm'n*, No. M2005-01517-COA-R3-CV, 2007 WL 187894, at * 9 (Tenn. Ct. App. M.S., filed January 24, 2007), a panel of this court indicated as follows:

By its plain language, the statute [Tenn. Code Ann. § 13-7-208] protects only “industrial, commercial or business establishment[s].” Tenn. Code Ann. § 13-7-208(b)(1); *Custom Land Dev., Inc. v. Town of Coopertown*, 168 S.W.3d 764, 775 (Tenn. Ct. App. 2004) (noting that purpose of statute was “to protect ongoing business operations”). In zoning parlance, use of real property for human habitation is generally classified as “residential,” regardless of whether someone profits from it. Zoning laws typically employ terms such as

“commercial,” “industrial,” and “business” in contradistinction to the term “residential.” 6 ZONING LAW AND PRACTICE § 35-2, at pp. 35-3 to 35-7; § 38-1, at pp. 38-1 to 38-2; § 39-1, at pp. 39-1 to 39-5; § 44-1, at p. 44-1. 3 AMERICAN LAW OF ZONING § 18.15, at 304. Tennessee’s zoning statutes are no exception.

(Capitalization in original; footnotes omitted).

Owner seeks to use the property in an indisputably residential manner. He desires to lease out the three units of the premises to individuals and families for human habitation. Tenn. Code Ann. § 13-7-208 confers no grandfathering protection for this use. Accordingly, only the City’s ordinance applies in this matter.

B.

The power of local governments to enact ordinances regulating the use of private property is derived from the state and is delegated to them by the legislature. *Henry v. White*, 250 S.W.2d 70, 71 (Tenn. 1952); *Anderson County v. Remote Landfill Servs., Inc.*, 833 S.W.2d 903, 909 (Tenn. Ct. App. 1991). Local governments’ statutory power to employ zoning measures to control the use of land within their boundaries is firmly established. *Draper v. Haynes*, 567 S.W.2d 462, 465 (Tenn. 1978). The City’s zoning ordinance, subsection 205.01, states, in part, that “[i]f such non-conforming building is removed or the non-conforming use of such building is discontinued for 100 consecutive days, every future use of such premises shall be in conformity with the provisions of this Ordinance.”

In interpreting a zoning ordinance, a court must strictly construe the relevant ordinance in favor of the property owner. *Boles v. City of Chattanooga*, 892 S.W.2d 416, 420 (Tenn. Ct. App. 1994) (citing *State ex rel. Wright v. City of Oak Hill*, 321 S.W.2d 557, 559 (Tenn. 1959)). A zoning ordinance is in derogation of the common law because it operates to deprive an owner of a use of land which might otherwise be lawful. *Oak Hill*, 321 S.W.2d at 559.

Under the facts of this case, Owner contends that the trial court erred in ruling that a lack of tenants constituted a discontinuance of the non-conforming use for 100 consecutive days. He quotes from 83 Am. Jur. 2d *Zoning and Planning* § 619 at 534-35 (2003) as follows:

Discontinuance of a nonconforming use may sometimes be caused by the loss of a tenant, but this generally does not result in an abandonment, so long as the owner makes a diligent effort to locate a new tenant.

(Citations omitted). Owner further asserts that a lack of multiple lodgers has been held not to constitute discontinuance where the apartments were still available for rent. He cites us to James

L. Isham, Annotation, *Zoning: Occupation Of Less Than All Dwelling Units As Discontinuance Or Abandonment Of Multifamily Dwelling Nonconforming Use*, 40 A.L.R. 4th 1012 (1985).

Relying on **Boles**, Owner asserts that the voluntary and affirmative actions of the prior owners did not manifest an intention to abandon the non-conforming multi-family use of the property. In **Boles**, an injunction had been issued which required the closure of an adult-oriented establishment which wanted to lease its premises to another lessee of adult products. More than 100 days had passed since the premises were used for an adult-oriented establishment, however, the court found that the failure to maintain its non-conforming use was due to the injunction and not due to the intent of the owner. This court held as follows:

The word “discontinued” as used in a zoning ordinance is generally construed to be synonymous with the term “abandoned.” The meaning of the word “abandoned,” in the zoning context, generally includes an intention by the landowner to abandon as well as an overt act of abandonment.

Boles, 892 S.W.2d at 420 (citing Douglas Hale Gross, Annotation, *Zoning: Right to Resume Nonconforming Use of Premises After Involuntary Break in the Continuity of Nonconforming Use Caused by Governmental Activity*, 56 A.L.R. 3d 138, 151, 152 (1974)). The **Boles** court noted that

the term “discontinued” or words of similar import, as utilized in zoning ordinances with specific time limitations, should be construed to include an element of intent, combined with some act – or failure to act – indicative of abandonment. . . .

Id., 892 S.W.2d at 422. This court added that such an ordinance will not apply “if the discontinuance of the non-conforming use is purely involuntary in nature.” **Id.**

Owner further argues that there was no consolidation of any of the units into one unit and that repairs and renovations were undertaken without any intent to combine units. The separate kitchen and bath fixtures and appliances were maintained, ready for new tenants. According to Owner, except for the time when they were being renovated, the units were always available to let. He also contends that electricity was supplied to all the units throughout the relevant period and asserts that “[y]ou don’t keep power on in some of your rental property . . . if you are abandoning that use.”

As argued by the City, the circumstances in **Toles v. City of Dyersburg**, 39 S.W.3d 138 (Tenn. Ct. App. 2000), are very similar to those in the present matter, namely that the discontinuance of the non-conforming use was due to the owners voluntarily not using the property for the non-conforming use and therefore the “grandfather” protection was lost. In **Toles**, this court indicated that

[w]e read *Boles* to support the proposition that “intent” is only important where some force outside the control of the property owner prevents the continued use of the land in a particular manner.

39 S.W.3d at 141. Unlike the injunction in *Boles*, nothing prevented the prior owners of this property from renting out the units. As found by the trial court, there was no extrinsic force which prevented the leasing of the property. There was nothing involuntary about the cessation of the non-conforming use.

The trial court properly determined that “the protection of the grandfather clause had been lost long before Owner bought the property on July 21, 2005” and “the lack of any tenant for approximately twenty (20) months resulted in the loss of the grandfather clause’s protection for 217 W. Newberry Street.” The failure of the Roberts’ Estate and/or Wallis Properties, LLC to lease the property as a triplex, or rent to at least two tenants, was a discontinuance of the non-conforming use.

V.

We do not find that the evidence preponderates against the trial court’s resolution of this matter. Accordingly, the judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the trial court’s judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Peter H. Phillips.

CHARLES D. SUSANO, JR., JUDGE